

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

FOR MR. JUSTICE STEPHENS

TRANSCRIPT OF RECORD

United States Court of Appeals for the
District of Columbia

APRIL TERM, 1936

908

No. 6748

MINNIE M. BURGOON, APPELLANT,

vs.

ROSA LAVEZZO, JOSEPH T. SHERIER, TRUSTEE,
WILLIAM H. McDONALD, TRUSTEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED JUNE 12, 1936

PRINTED JULY 17, 1936

United States Court of Appeals for the District of Columbia

APRIL TERM, 1936.

No. 6748

MINNIE M. BURGOON, APPELLANT,

vs.

ROSA LAVEZZO, JOSEPH T. SHERIER, TRUSTEE,
WILLIAM H. McDONALD, TRUSTEE, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

INDEX.

	Original	Print
Caption	a	1
Bill of complaint for equitable subrogation, and for other purposes	1	1
Motion to dismiss certain portions of bill of complaint.....	11	8
Reply of plaintiff to motion	13	9
Decree sustaining in part and overruling in part defendants' motion to dismiss	15	10
Stipulation	17	11
Finding of facts	19	13
Conclusions of law	20	13
Decree establishing plaintiff's right of subrogation, etc.....	22	14
Exception and appeal noted by plaintiff; cost bond on appeal fixed at \$100.00 and in lieu thereof supersedeas at \$1500	24	16
Memorandum: Undertaking (Supersedeas) \$1500.00 approved and filed	25	16
Assignment of Errors	25	16
Designation of Record	27	18
Clerk's Certificate	28	19

United States Court of Appeals for the District of Columbia

a Supreme Court of the District of Columbia.

No. 59435 In Equity

MINNIE M. BURGOON, *Plaintiff*,

vs.

ROSA LAVEZZO, JOSEPH T. SHERIER, Trustee, WILLIAM H.
McDONALD, Trustee, *Defendants*.

UNITED STATES OF AMERICA,
District of Columbia, ss:

BE IT REMEMBERED, That in the Supreme Court of
the District of Columbia, at the City of Washing-
ton, in said District, at the times hereinafter men-
tioned, the following papers were filed and pro-
ceedings had, in the above-entitled cause, to wit:—

1 Filed September 10, 1935

In the Supreme Court of the District of Columbia

Equity No. 59435.

MINNIE M. BURGOON, *Plaintiff*,

vs.

ROSA LAVEZZO, JOSEPH T. SHERIER, Trustee, WILLIAM H.
McDONALD, Trustee, *Defendants*.

*Bill of Complaint for Equitable Subrogation, and for
Other Purposes.*

To the Supreme Court of the District of Columbia, hold-
ing an Equity Court, plaintiff respectfully represents:

First: She is an adult citizen of the United States, a
resident of the District of Columbia, and sues in her own
right.

Second: The defendants are adult citizens of the United
States and residents of the District of Columbia. The de-
fendant Rosa Lavezzo is sued in her own right; the defen-

dants Joseph T. Sherier and William H. McDonald are sued as trustees, as hereinafter set forth.

Third: Plaintiff is the record owner in fee, and in possession thereof, of Lot Nine (9) in John Carroll Brent, Trustee's subdivision of Square Four Hundred and Twenty (420), in the City of Washington, District of Columbia, as per plat recorded in Liber W. F. folio 65 of the records of the Surveyor's Office, being known as premises 1615 Eighth Street, Northwest.

Fourth: On November 8, 1929, James A. Green and his wife, Leah C. Green, were the record owners of said property, they having purchased it from Frances G. Dorsey by deed dated May 14, 1929, and recorded May 15, 1929 in Liber 6323 folio 130 et seq.

On that day, November 8, 1929, said Greens borrowed \$4,500. from the Perpetual Building Association, giving therefor their promissory note, and to secure the repayment thereof they executed and delivered a deed of trust upon said property dated November 8, 1929, and recorded November 11, 1929 in Liber 6393 folio 315 et seq., the principal and interest of which being payable monthly. This deed of trust and debt secured thereby will hereafter be referred to as the senior trust.

On the following day, November 9, 1929, the said Greens made and delivered their two promissory notes of \$1,000. and \$500., respectively, dated November 9, 1929, payable to the order of Frances G. Dorsey three years after date with interest at the rate of seven per centum per annum, payable semi-annually, and to secure the payment of said indebtedness they executed and delivered a second deed of trust upon said property, dated November 9, 1929, and recorded November 13, 1929 in Liber 6394 folio 113 et seq. This debt and trust will hereafter be referred to as the junior trust.

The indebtedness represented and secured upon said property by the aforesaid two deeds of trust was used and applied by said Greens towards the payment, satisfaction, discharge and release of record of two debts secured by deeds of trust upon said property given prior to November 8, 1929, one of \$4,000. being recorded in Liber 5793 folio 237 et seq., and the other of \$1,350. being recorded in Liber 6327 folio 77 et seq.

Fifth: On July 30, 1931, said Greens by deed of that date and recorded August 26, 1931 in Liber 6588 folio 363 et seq., conveyed their equity of redemption in said property to said Frances G. Dorsey in fee simple and surrendered possession of said property to her.

Upon information and belief plaintiff avers that said deed was accepted by the said Frances G. Dorsey upon her belief, as well as the representation of said grantors, that the aforesaid senior and junior trusts were the only encumbrances of record against said property and to which said conveyance was subject.

Upon information and belief plaintiff further avers that at that time, to wit, July 30, 1931, the said Greens were in default in their payments of principal and interest upon the senior trust and they were also in default in the payment of interest on the junior trust; that taxes were overdue and unpaid and said property was subject to sale and foreclosure under both of said trusts because of such default; also that the total indebtedness owing under the senior and junior trusts then equaled the value of the property and a foreclosure and sale thereof under either or both of said trusts would not have yielded any funds for application on the third trust hereinafter mentioned.

Sixth: On October 13, 1931, plaintiff contracted with J. Leo Kolb for the purchase of said property, the purchase price being \$5,600. At that time there was owing approximately \$4,145.21 upon the senior trust and \$1,437.18

4 upon the junior trust. Plaintiff agreed to pay in cash, or securities equivalent thereto in value, the difference between the purchase money, \$5,600., and the amount, \$4,145.21, owing on the senior trust, and to take title subject only to the senior debt and trust, it being represented by the said Kolb that the aforesaid senior trust would be the only indebtedness against said property when conveyed to her.

Thereafter, and prior to November 2, 1931, plaintiff paid the difference, \$1,554.79, between the purchase price, \$5,600., and the balance, \$4,145.21, owing on the senior trust, and thereupon, by deed dated November 2, 1931, and recorded November 7, 1931 in Liber 6609 folio 502 et seq. the said Frances G. Dorsey, the then record owner thereof, conveyed said property to plaintiff in fee simple.

Plaintiff further avers, upon information and belief, that in total ignorance of the existence of record of the third deed of trust hereinafter mentioned, the said Frances G. Dorsey applied the aforesaid portion, \$1,554.79, of said purchase money to the payment, discharge and release of the aforesaid junior trust in order to protect and perfect her title and to fulfill the contractual obligation to convey to plaintiff a good and unencumbered title to said property subject only to the aforesaid senior trust; the release of said junior trust being dated October 31, 1931, and recorded November 6, 1931 in Liber 6609 folio 389 et seq.

Seventh: Plaintiff was recently notified by the defendant Joseph T. Sherier, trustee, that by a third deed of trust dated April 23, 1931, and recorded April 30, 1931 in Liber 6551 folio 63 et seq., (which was a date prior to their aforesaid conveyance of their equity of redemption
5 in said property to Frances G. Dorsey) the said Greens conveyed said property (and also Lot 86 in Square 2859) to him and the defendant William H. McDonald, as trustees, in trust to secure to the defendant Rosa Lavezzo the payment of the sum of \$10,300., represented by their note payable to the order of the defendant Rosa Lavezzo, and that said note is still owned by her and unpaid.

Plaintiff avers that at the time the said note and third trust were given and executed, the said Greens' equity in said property was of no value as the aggregate indebtedness thereon represented and secured by the aforesaid senior and junior trusts equaled the market value of the said property.

Plaintiff further avers that simultaneously with the execution of the aforesaid third deed of trust by said Greens, the defendant Rosa Lavezzo by deed of the same date as said third deed of trust, and recorded in Liber 6551 folio 62 et seq., conveyed to the said Greens a parcel of real estate assessed as Lot 86 in Square 2859 and that the sole consideration for the third trust was the security to the defendant Rose Lavezzo of the payment of the deferred purchase money for that property, and which was first described in said third deed of trust.

Plaintiff further avers that the defendants Joseph T. Sherier and William H. McDonald, pursuant to the alleged

authority vested in them as trustees under said third deed of trust, and at the request of the defendant Rosa Lavezzo, have advertised the said property, as well as said Lot 86 in Square 2859, for sale at public auction on September 12, 1935, and that they and the defendant Rosa Lavezzo claim and assert that the lien upon plaintiff's said property represented by the third deed of trust is now subordinate

6 and junior only to the balance of the debt owing the Perpetual Building Association under the senior trust, and that they are proceeding accordingly, although plaintiff avers that prior to their advertisement of said property for sale, she, through her counsel, verbally notified the defendant trustees that she intended to file this suit and she urged them to withhold the advertisement of her property until her rights, as herein presented and averred, were adjudicated, but they declined to do so, they representing that the defendant Rosa Lavezzo was insistent upon their proceeding with the foreclosure of said third deed of trust by sale of both properties described therein.

Eighth: Plaintiff further avers that the fair market value of her said property at the time she purchased it did not exceed \$5,600., it being at that time assessed for taxes at \$4,850.

Upon purchasing said property plaintiff was put in possession thereof and she has peaceably retained such possession until the present time.

Ninth: Plaintiff further avers that she did not have the title of said property examined, that she purchased it and made the aforesaid cash payment of \$1,554.79, paid out the sum of \$338.15 for repairs and permanent improvements to the building upon her property, paid all taxes and assessments levied against the same, regularly paid the interest upon the senior trust, and paid upon the principal thereof, to protect and perfect her ownership and title, the sum of \$1,835.35, thereby reducing it to \$2,309.86, in total ignorance of the existence of the aforesaid third deed of trust as a lien

7 upon her said property and in the belief that the aforesaid senior debt and trust was the only lien of record against her property. She further avers, upon information and belief, that at the time her grantor accepted from the said Greens their conveyance of their equity of redemption in said property, as aforesaid, her

grantor did not know of the existence of the aforesaid third deed of trust; neither did her grantor know thereof at the time she conveyed said property to plaintiff.

Tenth: Plaintiff is advised by counsel and upon such advice avers that by reason of the matters, facts and circumstances aforesaid, all of which she expects to prove by competent evidence at the hearing of this cause, that—

(a) To the extent of the sum of \$1,554.79, and interest thereon from October 14, 1931, she, in equity and good conscience, by reason of the matters aforesaid, either as purchaser or as assignee of her grantor, or otherwise, succeeded to all of the mortgagee's rights in said property which originally were protected and secured by the aforesaid junior trust, and that by operation of the doctrine of equitable subrogation she is entitled to have such right therein adjudicated and established by a decree of this Honorable Court to be paramount and superior to the aforesaid third deed of trust under which the defendants are claiming and operating as aforesaid.

(b) To the extent of the sum of \$1,835.35 paid by her on the principal thereof, with interest thereon from the date of each payment, she, in equity and good conscience, by reason of the matters aforesaid, succeeded to all the rights in said property which are protected and secured by the aforesaid senior trust and that by operation of said doctrine of equitable subrogation, she is entitled to have such right therein adjudicated and established by decree of this Court to be superior to the aforesaid third deed of trust but subordinate only to the balance owing the Perpetual Building Association under said senior trust.

(c) She has the right to have it adjudicated and established by decree of this Honorable Court that to the extent of the amount paid by her to repair and permanently improve the dwelling house upon said property owned by her, she is entitled to be reimbursed and be given an equitable lien therefor, with interest, upon said property paramount and superior to the aforesaid third deed of trust.

(d) She is entitled to have a trustee appointed to sell said property to satisfy her asserted claims when judicially established; such sale to be subordinate and junior only to

the balance owing on the principal of said senior trust and without prejudice to it.

(e) She is entitled to have the advertised sale of her property, if made, set aside and vacated at the defendants' cost and expense, or that a decree be entered against the defendants, jointly and severally, for such loss and damage as she may sustain through such sale being made pendente lite.

Eleventh: Plaintiff further avers that at the present time said property is worth approximately \$5,000. and that if it is sold it is her belief that it would not yield sufficient funds to pay in full the balance owing upon said senior trust and the claims asserted by her under the tenth paragraph. She further avers that if the threatened sale is made, as advertised, she will sustain irreputable loss. She further avers that by reason of the matters, facts
9 and circumstances pleaded herein, she is entitled to an injunction, pendente lite, against the defendants enjoining them from executing the provisions of the said third trust by selling said property prior to the adjudication and establishment of her asserted rights.

Twelfth: Plaintiff further avers, upon information and belief, that her grantor, Frances G. Dorsey, is insolvent and no judgment which she might obtain against her at law could be collected.

Thirteenth: Plaintiff further avers that she is without any remedy at law in the premises.

Wherefore she prays:

1st: That process issue against the defendants who are the persons named as such in the caption of this Bill, requiring them to appear and answer; answer under oath being waived.

2nd: That a rule be issued requiring the defendant trustees to show cause why the advertised sale under the third trust should not be enjoined pendente lite.

3rd: That an order be made enjoining the defendant trustees, pendente lite, from selling said property pursuant to the advertisement.

4th: That her equitable rights and claims asserted in the tenth paragraph of this Bill be established and enforced in the manner therein stated or as in equity and good conscience she may be entitled.

10 5th: That she may have such other and further relief in the premises as in equity and good conscience she may be entitled.

MINNIE M. BURGOON.

District of Columbia, ss:

I do solemnly swear that I have read the foregoing Bill of Complaint by me subscribed and I know the contents thereof; that the facts therein stated as of my own personal knowledge are true and those stated as upon information and belief I believe to be true.

MINNIE M. BURGOON.

Subscribed and sworn to before me this 9th day of September, A.D. 1935.

THERESA BUCKHANTZ,

(Notarial Seal)

Notary Public, D. C.

GEORGE C. GERTMAN,

Attorney for Plaintiff.

11 *Motion to Dismiss Certain Portions of Bill of Complaint*

Filed November 26, 1935

* * * * *

Come now the defendants in the above entitled cause, and move the Court to dismiss so much of the bill of complaint as seeks to apply the doctrine of equitable subrogation to the extent of the sum of \$1,554.79, and interest thereon from October 14, 1931, representing the cash payment made by the plaintiff on account of the purchase price of the property in question, and to the sum of \$338.15 expended by the plaintiff for the repair and permanent improvement to the building upon the land, and for grounds of such motion say:

1. The bill shows on its face that the third deed of trust was duly recorded before the conveyance by the Greens of their equity of redemption in the property to Frances G. Dorsey and likewise prior to the date of the execution and delivery of the deed of release of the junior trust. The plaintiff was therefore constructively charged with knowledge of the existence of the third deed of trust.

2. The plaintiff was under no legal obligation to purchase the premises in question, but acted as a volunteer in paying to Frances G. Dorsey the sum of \$1,554.79, representing the difference between the balance due on the senior trust and the agreed purchase price of \$5,600.00. The bill does
 12 not allege that there was any agreement between the plaintiff and her grantor that the payment of the sum of \$1,554.79 was to be applied to extinguish the junior trust; nor does it allege that there was any agreement to assign, or any assignment of the junior trust to the plaintiff.

3. The bill shows on its face that the plaintiff has enjoyed peaceable possession and the rents and profits of the premises from November 2, 1931 to the present time, more than four years, and she ought not in good conscience be permitted to invoke the doctrine of equitable subrogation so as to succeed to the rights of the junior mortgages to the extent of the sum of \$338.15 for moneys advanced for repairs and improvements, she being under no necessity to make such repairs in order to protect her title to or interest in the property.

LECKIE & SHERIER

By Joseph T. Sherier

Attorneys for Defendants.

13 *Reply of Plaintiff to the Motion of Defendant Rosa Lavezzo to Dismiss Certain Portions of the Bill of Complaint.*

Filed December 17, 1935

* * * * *

1. Mr. Justice Harlan in *Memphis RR. Co., v. Dow.*, 120 U. S. 287, said—

“The right of subrogation is not founded on contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties.”

And in *Aetna Life Insurance Co., v. Town of Middleport*, 124 U. S. 534, Mr. Justice Miller said—

“Subrogation as a matter of right independent of agreement takes place only for the benefit of insurers, or of one who, being himself a creditor, has satisfied the lien of a

prior creditor; or for the benefit of a purchaser who has extinguished an encumbrance upon the estate which he has purchased * * * *."

Upon the facts alleged in the bill, plaintiff is entitled to be subrogated to the lien of the junior deed of trust.

Taylor v. Macgreal, 167 U. S. 688, 701.

14 Stevens v. King, 84 Me. 291.

Williams v. Libbey, 118 Me. 80.

Hudson v. Dismukes, 77 Va. 242.

Dixon v. Morgan, 154 Tenn. 389.

Arnold v. Green, 116 N. Y. 566.

Thrift v. Michaelis, 259 N. Y. 302.

Joyce v. Dauntz, 55 Ohio St. 538.

Barnes v. Cady, 232 Fed. 318.

Prestridge v. Lazan, 132 Miss. 168.

Hicks v. Beals, 83 Ore. 82.

Barnes v. Mott, 64 N. Y. 397.

Young v. Morgan, 89 Ills. 199.

Arlington State Bank v. Paulsen, 57 Nebr. 717, 745.

Kent v. Bailey, 181 Iowa 489.

Carnell v. Kramer, 194 Iowa 359, 366-367.

Adams v. Young, 200 Mass. 588.

La Salle O. H. Co. v. La Salle Amus. Co., 289 Ills. 194, 198.

Purdom v. Broach, 210 Ky. 161.

2. The plaintiff is entitled to an equitable lien for money used for the improvement of the real estate.

D. C. Code, Sec. 1003.

Tiffany, Real Property, 2d Ed., Vol. 1, Sec. 274, P. 943.

Jones on Liens, 3d Ed., Vol. 2, Sec. 1135, P. 117.

The Union Hall Association v. Morrison, 39 Md. 281.

GEORGE C. GERTMAN

Attorney for Plaintiff.

15 *Decree Sustaining in Part and Overruling in Part Defendants' Motion to Dismiss Bill of Complaint*

Filed January 17, 1936

* * * * *

This cause came on to be heard upon the motion of the defendants Rosa Lavezzo, Joseph T. Sherior, trustee, and William H. MacDonald, trustee, to dismiss the parts of the

bill of complaint which (1) seek equitable subrogation to the extent of \$1,554.79 with interest thereon, being the amount alleged to have been paid by the plaintiff for the release and discharge of record of the junior deed of trust dated November 9, 1929, and recorded November 13, 1929 in Liber 6394 folio 113 et seq., and (2) an equitable lien for \$338.15 alleged to have been paid for repairs and permanent improvements to the building on the land described in the bill, and the same having been argued by counsel and considered by the Court, it is, by the Court, this 17th day of January, A. D. 1936, ORDERED that said motion be and it is hereby overruled insofar as it concerns the item of \$1,554.79 and it is sustained insofar as it concerns the item of \$338.15 for repairs and permanent improvements to the building upon said property. The defendants are allowed ten days within which to answer the bill of complaint except as to the dismissed item of \$338.15; plaintiff electing to stand on her bill as originally framed.

JESSE C ADKINS

Justice.

From so much of the above decree as dismisses the bill of complaint in reference to the item \$338.15, the plaintiff notes an exception.

JESSE C ADKINS

The above decree has been submitted to counsel for the parties.

.....
Attorney for Plaintiff.

JOSEPH T. SHERIER

Attorney for Defendants.

17

Stipulation

Filed in open Court March 20, 1936

* * * * *

It is hereby stipulated and agreed by and between the parties to this cause, as follows:

1. That the allegations of fact set forth in the bill of complaint are true.

2. That the defendants concede plaintiff's right to subrogation regarding the item of \$1,835.35, with interest thereon, but they deny the plaintiff's right to equitable subroga-

tion in relation to the item of \$1,554.79, with interest thereon, and the item of \$338.15.

3. That this stipulation shall stand and operate as the defendants' answer to the bill of complaint.

4. That the defendants Joseph T. Sherier and William H. MacDonald did not offer for sale at public auction on September 12, 1935, the property described in this cause, but they did offer for sale at public auction on that date, as advertised, Lot 86 in Square 2859, together with the improvements thereon, and the defendant Rosa Lavezzo bought in the same for \$5,000.00, there being no other bidders attending the sale, and she has credited said amount on account of the principal of the promissory note secured by the third deed of trust described in the bill of complaint, dated April 23, 1931, and recorded April 30, 1931, in
18 Liber 6551, folio 63 et seq.

5. Subject to the objection of the plaintiff that the same is inadmissible, immaterial and irrelevant to the subject matter of the bill, and also subject to the Court ruling upon its admissibility at the hearing of this cause, it is agreed that if the defendant Rosa Lavezzo were called as a witness in her own behalf at the trial of this cause, she would testify that at and prior to the time she accepted the deed of trust mentioned in paragraph 7 of the bill as security for the note of April 23, 1931, for \$10,300.00, the makers of the note, James A. Green and his wife, Leah C. Green, who were also then the record owners of the premises known as Lot 9 in Square 420, represented to her that said Lot 9, Square 420 was then encumbered by only a first deed of trust securing the Perpetual Building Association approximately \$4,000.00, and that she did not have the title to said Lot 9, Square 420 examined but relied and acted upon the aforesaid representation of the said Greens.

6. That this cause may be advanced for hearing and disposition by the Court solely upon the law applicable to the facts set forth in the bill and in this stipulation; the parties hereto to be afforded an opportunity to argue the questions of law.

GEORGE C. GERTMAN

Attorney for Plaintiff

JOSEPH T. SHERIER

Attorney for Defendants

19

Finding of Facts

Filed March 30, 1936

* * * * *

This cause came on to be heard upon the bill of complaint and the stipulation filed in the cause. None of the parties submitted any oral evidence; the defendants in the stipulation having admitted as true all the allegations of fact set forth in the bill of complaint. The Court therefore finds as facts all the facts alleged in the bill of complaint and also that since the filing of the bill the defendants Sherier and McDonald, trustees, foreclosed the deed of trust dated April 23, 1931, and recorded April 30, 1931 in Liber 6551 folio 63 et seq., insofar as it concerned Lot 86 Square 2859 by selling that property at public auction on September 12, 1935, to defendant Rosa Lavezzo for \$5,000., there being no other bidders attending the sale, and she credited said purchase money on account of the principal of the promissory note of \$10,300., accrued interest and costs of sale, leaving an unpaid balance on said note of approximately \$5,000; the defendant trustees having, upon the filing of the bill of complaint, voluntarily withdrawn Lot 9 Square 420 from the advertised foreclosure sale referred to in the bill of complaint to await the ultimate result of this suit.

The sole matter considered by the Court was the right of the plaintiff to equitable subrogation for \$1,554.79, with interest thereon, under the second deed of trust upon Lot 9 Square 420, dated November 9, 1929, and recorded in Liber 6394 folio 113 et seq.

Conclusions of Law

Upon the admitted allegations of the bill of complaint, the finding of facts and the proceedings in this cause, the Court concludes as a matter of law, as follows:

1. That the decree of the motions Judge overruling the defendants' motion to strike that part of the bill of complaint pertaining to the subject of plaintiff's right to be subrogated to the rights of the mortgagee to the extent of \$1,554.79 under the second trust recorded in Liber 6394 folio 113 et seq., is not conclusive of the plaintiff's right to such subrogation or of the law of the case, nor is it binding up-

on the parties to this cause or the Court, and the Court disregards the prior ruling of the motions Judge in reference thereto and reserves the right to make such ruling and order in reference to the subject as it deems proper, notwithstanding the objection and exception of the plaintiff to so doing.

2. That the plaintiff is not entitled to be subrogated to the rights of the mortgagee under the second deed of trust on Lot 9 Square 420, recorded in Liber 6394 folio 113 et seq., to the extent of \$1,554.79, and interest thereon.

21 3. That the plaintiff is entitled to equitable subrogation in the amount of \$1,835.35, with interest thereon from the dates of the payment thereof to the Perpetual Building Association, the same being the conceded amount paid by plaintiff to the Building Association in reduction of the principal of the first trust against said property, dated November 8, 1929, and recorded November 11, 1929 in Liber 6393 folio 315 et seq.

4. That owing to the motions Judge having sustained the defendants' motion to dismiss the bill of complaint in reference thereto, the plaintiff did not present for the consideration of the Court her claim asserted for an equitable lien in the amount of \$338.15, representing money expended by her for permanent repairs and improvements to the dwelling house upon Lot 9 Square 420.

ALFRED A. WHEAT
Chief Justice.

22 *Decree Establishing Plaintiff's Right of Subrogation, etc.*

Filed March 30, 1936

* * * * *

This cause came on to be heard at this term; and thereupon, upon consideration thereof, it is, by the Court, this 30th day of March, A. D. 1936, ADJUDGED, ORDERED and DECREED, as follows:

First: That the item of \$338.15 expended by the plaintiff for repairs and permanent improvements to the dwelling on Lot 9 Square 420, and for which plaintiff prayed for an equitable lien, is hereby disallowed; the Court having by decree passed herein on the 17th day of January, 1936,

sustained the defendants' motion to strike said item from plaintiff's bill.

Second: That the item of \$1554.79 representing the cash amount paid by plaintiff at the time of her purchase of Lot 9 Square 420, as alleged in the sixth paragraph of the bill of complaint, which amount was applied by Frances G. Dorsey to the payment, discharge and release of the second trust dated November 9, 1929, and recorded November 13,

1929 in Liber 6394 folio 113 et seq., and for which
23 amount plaintiff claims legal and equitable subrogation to the rights of the mortgagee under said deed of trust, is hereby denied, and as to said item and the prayer of the bill in relation thereto, said bill is dismissed.

Third: That the plaintiff is hereby given by way of equitable subrogation an equitable lien on said Lot 9 in Square 420 for all money paid by her since November 2, 1931 (with interest thereon from date of payments) towards the reduction of the principal of the indebtedness owing the Perpetual Building Association and secured by first deed of trust on said Lot 9 Square 420, dated November 8, 1929, and recorded November 11, 1929 in Liber 6393 folio 315 et seq., the principal thereof amounting to \$1835.35, plus such additional amounts as may have been paid by the plaintiff to said Perpetual Building Association to the reduction of the principal of said debt since the filing of the bill of complaint; the same to be subordinate only to the balance of the principal and interest thereon owing said Building Association under its said deed of trust.

Fourth: That Joseph T. Sherier and George C. Gertman are hereby appointed trustees to sell said Lot 9 Square 420, together with the improvements thereon, and after deducting the costs and expenses incident to the sale, to apply the proceeds (1) to the payment and discharge of the balance of the indebtedness owing the Perpetual Building Association under its said deed of trust dated November 8, 1929 and recorded in Liber 6393 folio 315 et seq; (2) to the payment of the aforesaid equitable lien hereby created in plaintiff's favor, and (3) apply the balance upon the note secured by the deed of trust dated April 23, 1931, and recorded in Liber 6551 folio 63 et seq., owned by the defendant Rosa Lavezzo; they to first file in this cause an under-

24 taking in the maximum penalty of \$1000.00, conditioned for the faithful performance of their trust.

ALFRED A. WHEAT,
Chief Justice.

The plaintiff in open Court excepts to and notes an appeal to the United States Court of Appeals for the District of Columbia from that part of the foregoing decree which denies her right to equitable subrogation for the amount \$1554.79 which was applied by her grantor, Frances G. Dorsey, to the payment, discharge and release of the second deed of trust recorded in Liber 6394 folio 113 et seq., and dismisses her bill claiming equitable subrogation in reference thereto; plaintiff also excepts to and appeals from the denial of her right to equitable relief for \$338.15 expended for permanent improvements and repairs to the real estate and also to that part of said decree directing the application of the proceeds of sale to the exclusion of plaintiff's asserted right of subrogation for \$1554.79, and interest, under the second trust recorded in Liber 6394 folio 113 et seq. And plaintiff's cost bond on appeal is hereby fixed at \$100.00, and in lieu thereof her bond to operate as a supersedeas is hereby fixed at \$1500—.

ALFRED A. WHEAT,
Chief Justice.

25 *Memorandum*

April 6, 1936

Supersedeas

Undertaking on appeal \$1500.00 approved and filed.

Assignment of Errors

Filed April 6, 1936

* * * * *

Plaintiff Minnie M. Burgoon assigns the following errors committed by the Court in the above entitled cause at the hearing thereof upon its merits on March 30, 1936:

1. The Court, in the decree dated March 30, 1936, erred

in denying plaintiff the right of subrogation to the extent of \$1,554.79, and interest thereon, to the rights of the mortgagee under the second deed of trust on Lot 9 Square 420, dated November 9, 1929, and recorded November 13, 1929 in Liber 6394 folio 113 et seq., and in dismissing her bill of complaint in relation thereto.

2. The Court, in its said decree, erred in denying plaintiff an equitable lien against said property for \$338.15 expended by her for repairs and permanent improvements to the building thereon.

3. The Court, in its said decree, erred in directing the trustees, Joseph T. Sherier and George C. Gertman, to apply the net proceeds from the sale of said property on the third deed of trust after first discharging the balance owing on the first deed of trust and the equitable lien established by said decree in plaintiff's favor for the money paid by her towards the reduction of the principal of the indebtedness owing the Perpetual Building Association and secured

by the first deed of trust on said property, to the
26 exclusion of plaintiff's claimed equitable lien of
\$338.15 for money expended for repairs and permanent improvements, and her claimed right of subrogation of \$1,554.79, with interest thereon, to the rights of the mortgagee under the second deed of trust upon said property, dated November 9, 1929, and recorded November 13, 1929 in Liber 6394 folio 113 et seq.

4. The Court, in its said decree, erred in signing the aforesaid decree insofar as it dismissed plaintiff's bill of complaint and denied her relief in relation to the claimed equitable lien of \$338.15 and the claimed right of subrogation of \$1,554.79, to the mortgagee's rights under the second deed of trust dated November 9, 1929, and recorded November 13, 1929 in Liber 6394 folio 113 et seq.

5. The Court, at the trial of the case, erred in refusing to follow the decree of the Court signed by Mr. Justice Adkins, overruling the defendants' motion to dismiss plaintiff's bill insofar as she sought subrogation to the rights of the mortgagee under the second deed of trust.

6. Plaintiff Minnie M. Burgoon also assigns error committed by the Court on January 17, 1936, in sustaining the defendants' motion and dismissing plaintiff's bill of complaint insofar as she prayed for an equitable lien for \$338.15

expended by her for repairs and permanent improvements to the dwelling house on Lot 9 Square 420.

GEORGE C. GERTMAN

Attorney for Plaintiff

Minnie M. Burgoon.

Service of copy of the foregoing Assignment of Errors acknowledged this 2d day of April, 1936.

JOSEPH T. SHERIER

Attorney for Defendants.

27

Designation of Record

Filed April 6, 1936

* * * * *

The Clerk will please include the following in the record on the plaintiff's appeal from the decree passed in this cause on March 30, 1936:

1. Bill of Complaint.
2. Defendant's motion to dismiss parts of the Bill of Complaint.
3. Plaintiff's reply to the defendants' motion to dismiss.
4. Decree of January 17, 1936, sustaining in part and overruling in part defendants' motion to dismiss.
5. Stipulation filed March 20, 1936.
6. Finding of facts and conclusions of law filed March 30, 1936.
7. Final decree dated March 30, 1936, with notice of the appeal therefrom by the plaintiff and the fixing of the appeal bonds.
8. Memorandum of the approval and filing of the supersedeas bond and the date of the filing.
9. Assignment of errors.
10. This designation.
11. Clerk's certificate.

GEORGE C. GERTMAN

Attorney for Plaintiff

Minnie M. Burgoon.

Service of copy of the foregoing Designation of Record acknowledged this 2d day of April, 1936.

JOSEPH T. SHERIER

Attorney for Defendants.

28 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, FRANK E. CUNNINGHAM, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 27, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript in cause No. 59435 in Equity, wherein Minnie M. Burgoon is Plaintiff and Rosa Lavezzo et al. are Defendants, as the same remains upon the files and of record in said Court.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 10th day of June, 1936.

FRANK E. CUNNINGHAM,
Clerk.

By CHAS. B. COFLIN,
Assistant Clerk.

(Seal)

Endorsed on cover: United States Court of Appeals for the District of Columbia. Filed June 12, 1936. Moncure Burke, Clerk.

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED JUL 24 1936

Monroe Burke
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

APRIL TERM, 1936.

No. 6748.

MINNIE M. BURGOON, *Appellant*,

v.

ROSA LAVEZZO, ET AL., *Appellees*.

BRIEF FOR APPELLANT.

GEORGE C. GERTMAN,
Attorney for Appellant.

INDEX.

SUBJECT INDEX.

	Page
Nature of the Case	1
The Equitable Question Presented	1
The Facts	2
Recapitulation	4
Assignment of Errors	5
The Law of the Case in Equity.....	7
Federal Court Cases	12
State Court Cases	12

CASES CITED.

Aetna Life Insurance Co. v. Middleport, 120 U. S.	
534	9
Arnold v. Green, 116 N. Y. 566.....	13
Bank of Canton, 183 Ga. 185 (Dissenting Opinion)	12
Barnes v. Cady, 232 Fed. 318, 324	1-8-10-11-12
Barnes v. Mott, 64 N. Y. 397	13
Breyfogle v. Jackson, 113 Kan. 373.....	12
Capitol Nat'l Bank v. Holmes, 43 Colo. 154.....	12
Case v. Fant, 53 Fed. 41	8
Chase v. Van Meter, 140 Ind. 321	8
Clifford v. West Hartford Creamery Co., 103 Vt.	
229, 238	10
Darrough v. Herbert Kraft Co. Bank, 125 Cal. 272	12
Dixon v. Morgan, 154 Tenn. 389-411	9-13
Elmora & West End, &c. Assn. v. Dancy, 108 N. J.	
Eq. 542	8-13
Elterman v. Hyman, 192 N. Y. 113, 125	8
Enders v. Brune, 4 Randolph (Va.) 438, 447.....	10
Everson v. McMullen, 113 N. Y. 293, 299-300....	13
Factor's Ins. Co. v. Murphy, 11 U. S. 738.....	8
Farmers' & Mechanics' State Bank, 175 Wash.	
78, 85	10
Fifield v. Mayer, 79 N. H. 82.....	9-12-13
First Nat'l Bank v. Moore, 89 Ind. App. 189.....	8-12
First National Bank of Westport v. Moore, 88	
Ind. App. 189, 195	8-12
Hall v. Windsor Savings Bank, 97 Vt. 125, 133....	10

	Page
Hill v. Ritchie, 90 Vt. 318, 322	9-13
Hudson v. Dismukes, 77 Va. 242.....	13
Institute Building & Loan Assn. v. Edwards, 81 N. J. Eq. 359	9
Johnson v. Tootle, 14 Utah 483	13
Joyce v. Dauntz, 55 Ohio St. 538	13
Lenman v. Jones, 222 U. S. 51	9
Lowman v. Lowman, 118 Ill. 582	8
Mahuk v. Blanchard, 233 App. Div. (N.Y.) 555, 559	8-10
Matzen v. Shaeffer, 65 Cal. 81	12
Memphis R. R. Co. v. Dow, 120 U. S. 287.....	9
Merchants' & Miners' Trans. Co. v. Robinson- Baxter Co., 191 Fed. 769, 772.....	10-11
Minton v. Sutton, 100 N. J. Eq. 403, 407.....	8
Moritz v. Redd, 151 Va. 644, 652.....	10
Pease v. Egan, 131 N. Y. 262, 270-273.....	8
Pittsburgh-Westmoreland Coal Co. v. Kerr, 220 N. Y. 137, 143, 144.....	8-13
Prestridge v. Lazan, 132 Miss. 168	13
Rachel v. Smith, 101 Fed. 159	10-12
Richardson v. Hockenhull, 85 Ill. 124.....	8
Shaffer v. McClosky, 101 Cal. 576.....	11
Southern Cotton Oil Co. v. Napoleon Co., 108 Ark. 555	12
Stantons v. Thompson, 49 N. H. 272	8
Stevens v. King, 84 Me. 291	13
Stowers v. Wheat, 78 Fed. (2d) 85	10-12
Taylor v. Macgreal, 167 U. S. 688, 701.....	10
The Bergen, 64 Fed. (2d) 877, 880.....	8
The Thrift v. Michaelis, 259 N. Y. 302	13
Walker v. Walker, 138 Tenn. 679, 682	10
Wallace v. Benner, 200 N. C. 124	13
Williams v. Libby, 118 Me. 80	9-13
Young v. Morgan, 89 Ill. 199	12

ENCYCLOPEDIA AND TEXT-BOOKS.

Jones on Mortgages, Vol. 2, Chap. 20, p. 508.....	8
Pomeroy's Eq. Juris., 4th Ed. Vol. 2, ss. 793, 798, 856, 1211, 1211	8-9
19 Ruling Case Law 489	8

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA.

APRIL TERM, 1936.

No. 6748.

MINNIE M. BURGOON, *Appellant*,

v.

ROSA LAVEZZO, ET AL., *Appellees*.

BRIEF FOR APPELLANT.

NATURE OF THE CASE.

Appellant, who was plaintiff below, appeals from a final decree denying her the right of equitable subrogation under a second mortgage which she paid as purchaser of the mortgaged premises (R. 14-16).

THE EQUITABLE QUESTION PRESENTED.

The question presented is whether a purchaser of mortgaged premises who, out of the purchase money, pays and discharges a second mortgage in ignorance of a third mortgage, is entitled to be subrogated to the rights of the mortgagee under the paid second mortgage? See *Barnes v. Cady*, 232 Fed. 318, 324.

THE FACTS.

In substance, the bill charges (R. 1-8) and appellees admit (R. 11)—

1. On November 8, 1929, James A. Green and wife gave two mortgages on 1615 Eighth Street, the first of \$4500 to the Perpetual Building Association and the second of \$1500 to Frances G. Dorsey.

The above mortgages equaled the value of the property.

2. On April 23, 1931, the Greens purchased Lot 86 Square 2859 from appellee Lavezzo and, through the means of a mortgage securing the purchase money, gave appellees a first lien on the purchased property and a third lien on the Eighth Street property. This is the third mortgage above referred to.

At the time this third mortgage was given, the Greens' equity of redemption in the Eighth Street property was of no value whatever as the first and second mortgages equaled the market value of that property.

3. On July 30, 1931, the Greens were in default in their payments of principal and interest to the Building Association on the first mortgage and in their interest to Frances G. Dorsey on their second mortgage. Taxes also were in default.

If the Eighth Street property had then been foreclosed under the first or second mortgages, the sale would not have yielded anything to apply towards the third mortgage as the first and second mortgages equaled the value of the property.

4. On July 30, 1931, the Greens, representing that the first and second mortgages were the only encumbrances of record, conveyed their equity of redemption in the Eighth Street property to Frances G. Dorsey *subject* to the first and second mortgages.

5. On October 13, 1931, Frances G. Dorsey sold the Eighth Street property to appellant for \$5600; *her primary interest and estate therein being her second mortgage of \$1500.*

Dorsey, who is insolvent, innocently represented to appellant, who believed it to be true, that the first and second mortgages were the only liens against the property and appellant did not discover the third mortgage until four years later when her property was advertised under it for sale.

6. Appellant's contract of purchase obligated her to pay Frances G. Dorsey, *as part of the purchase money*, the \$1554.79 then owing her on the second mortgage and to take title subject only to the first mortgage of \$4145.21—the two mortgages equaling the purchase price as well as the value of the property. The property being then assessed at \$4850.

7. Appellant did not have the title to the Eighth Street property examined and, in ignorance of the third mortgage, she paid Frances G. Dorsey the \$1554.79 and took title subject only to the first mortgage; her deed being dated November 2, 1931 and recorded November 7, 1931.

8. Frances G. Dorsey—also ignorant of the third mortgage—in turn applied the \$1554.79 *wholly* to the payment and discharge of the second mortgage which she owned ;the release being dated October 31, 1931, and recorded November 6, 1931.

9. During the following four years appellant, still ignorant of the third mortgage, paid the Building Association \$1835.35 towards the reduction of the first mortgage from \$4145.21 to \$2309.86.

10. Appellees claim that, in equity, appellant's payment of the second mortgage and her reduction of the first mortgage to \$2309.86 inured to their benefit and

that the lien of their third mortgage against the Eighth Street property has been advanced or promoted and that it is now subordinate only to the balance \$2309.86 owing the Building Association on the first mortgage.

RECAPITULATION.

The property itself:

Worth \$5600, assessed at \$4850.

First mortgage \$4500 owing Building Association.

Second mortgage \$1500 owing Frances G. Dorsey.

Third mortgage \$10,300 owing appellees.

Dorsey's interest:

Dorsey had \$1500 invested in the property which she was entitled to have paid. Greens' deed conveying to her the equity of redemption was subject to that mortgage. She gave nothing for the equity of redemption and received nothing for it. What she got from appellant was payment of her mortgage of \$1500 and interest.

Appellant's interest:

Appellant bought the property for \$5600—being the aggregate debt owing under the first and second mortgages—upon the understanding that upon her payment of both of the mortgages, the title would be good and unencumbered of record.

Appellees' interest:

At the time appellees obtained the third mortgage, there was of record against the Eighth Street property two subsisting mortgages equaling its market value, consequently appellees third mortgage against that property was valueless unless they first paid and discharged the first and second mortgages.

ASSIGNMENT OF ERRORS.

Plaintiff Minnie M. Burgoon assigns the following errors committed by the Court in the above entitled cause at the hearing thereof upon its merits on March 30, 1936:

1. The Court, in the decree dated March 30, 1936, erred in denying plaintiff the right of subrogation to the extent of \$1,554.79, and interest thereon, to the rights of the mortgagee under the second deed of trust on Lot 9 Square 420, dated November 9, 1929, and recorded November 13, 1929 in Liber 6394 folio 113 *et seq.*, and in dismissing her bill of complaint in relation thereto.

2. The Court, in its said decree, erred in denying plaintiff an equitable lien against said property for \$338.15 expended by her for repairs and permanent improvements to the building thereon.

3. The Court, in its said decree, erred in directing the trustees, Joseph T. Sherier and George C. Gertman, to apply the net proceeds from the sale of said property on the third deed of trust after first discharging the balance owing on the first deed of trust and the equitable lien established by said decree in plaintiff's favor for the money paid by her towards the reduction of the principal of the indebtedness owing the Perpetual Building Association and secured by the first deed of trust on said property, to the exclusion of plaintiff's claimed equitable lien of \$338.15 for money expended for repairs and permanent improvements, and her claimed right of subrogation of \$1,554.79, with interest thereon, to the rights of the mortgagee under the second deed of trust upon said property, dated November 9, 1929, and recorded November 13, 1929 in Liber 6394 folio 113 *et seq.*

4. The Court, in its said decree, erred in signing the aforesaid decree in so far as it dismissed plaintiff's bill of complaint and denied her relief in relation to the claimed equitable lien of \$338.15 and the claimed right of subrogation of \$1,554.79, to the mortgagee's rights under the second deed of trust dated November 9, 1929, and recorded November 13, 1929 in Liber 6394 folio 113 *et seq.*

5. The Court, at the trial of the case, erred in refusing to follow the decree of the Court signed by Mr. Justice Adkins, overruling the defendants' motion to dismiss plaintiff's bill in so far as she sought subrogation to the rights of the mortgagee under the second deed of trust.

6. Plaintiff Minnie M. Burgoon also assigns error committed by the Court on January 17, 1936, in sustaining the defendants' motion and dismissing plaintiff's bill of complaint in so far as she prayed for an equitable lien for \$338.15 expended by her for repairs and permanent improvements to the dwelling house on Lot 9 Square 420.

THE LAW OF THE CASE IN EQUITY.

1. Upon discovering the third mortgage and learning that the appellees, as mortgagees, were advertising her property for sale under it, appellant filed this suit seeking to be subrogated to the rights of the mortgagees under the second and first mortgages *to the extent that she paid and discharged them* (R. 1-8).

Appellees then conceded appellant's right of subrogation under the first mortgage for \$1835.35 but resisted her right of subrogation under the second mortgage for \$1554.79 (R. 8-9).

Appellees' primary defenses to the suit were that appellant paid and discharged the second mortgage as a volunteer with constructive notice of the third mortgage and that there was no agreement between her and Dorsey for subrogation under the second mortgage (R. 8-9).

Appellees' motion to dismiss the Bill upon the grounds stated was overruled (R. 10-11). Appellees did not plead over but stipulated that the factual allegations were true (R. 11-12). The Trial Justice disregarded the former action of the Court and over appellant's objection and exception, denied appellant subrogation under the second mortgage *without assigning any reason therefor* (R. 13-14).

From the final decree denying her equitable subrogation under the second mortgage for \$1554.79 and interest appellant perfected this appeal *by giving a supersedeas bond* (R. 16).

Appellant abandons her claim for an equitable lien for \$338.15 representing money expended for repairs and permanent improvements.

2. This litigation does not in any sense involve the question whether, as between Dorsey on the one hand, and the Greens on the other, the deed of the latter con-

veying their equity of redemption to the former satisfied and extinguished their debt owing Dorsey secured by the second mortgage.

Neither have appellees claimed that, as between them and appellant, Greens' conveyance of their equity of redemption to Dorsey extinguished Dorsey's second mortgage or that there was a merger effected thereby. Indeed, upon the admitted allegations of the bill, it could not be so claimed as the conveyance was *subject* to the first and second mortgages, and the intermediate third mortgage or estate was outstanding in appellees.

Factor's Ins. Co. v. Murphy, 111 U. S. 738.

The Bergen, 64 Fed. (2d) 877, 880.

Case v. Fant, 53 Fed. 41.

Richardson v. Hockenhull, 85 Ill. 124.

Lowman v. Lowman, 118 Ill. 582.

Chase v. Van Meter, 140 Ind. 321.

Stantons v. Thompson, 49 N. H. 272.

Jones on Mortgages, Vol. 2, Chap. 20, p. 508.

19 R. C. L. 489.

Pomeroy's Eq. Juris., 4th Ed. Vol. 2, ss. 793, 798.

3. Appellant was not a volunteer. Her relationship to the property by virtue of her contract as purchaser gave her an equitable interest which equity protects and secures.

Barnes v. Cady, 232 Fed. 318, 324.

First National Bank of Westport v. Moore, 88 Ind. App. 189, 195.

Pease v. Egan, 131 N. Y. 262, 270-273.

Minton v. Sutton, 100 N. J. Eq. 403, 407.

Elmora & West End &c. Assn. v. Dancy, 108 N. J. Eq. 542.

Pittsburgh-Westmoreland Coal Co. v. Kerr, 220 N. Y. 137, 143, 144.

Mahuk v. Blanchard, 233 App. Div. (N. Y.) 555, 559.

Elterman v. Hyman, 192 N. Y. 113, 125.

Appellant, by virtue of her contract, was the equitable owner of the property. *Lenman v. Jones*, 222 U. S. 51.

4. Constructive notice is not enough; there must be actual notice. Inasmuch as appellant owed appellees no positive duty, her failure to have the title examined beforehand did not constitute culpable negligence or preclude her right to equitable subrogation under the second mortgage.

Williams v. Libby, 118 Me. 80.

Institute Building & Loan Assn. v. Edwards, 81 N. J. Eq. 359.

Hill v. Ritchie, 90 Vt. 318, 322.

Fifield v. Mayer, 79 N. H. 82.

Dixon v. Morgan, 154 Tenn. 389, 411.

Pomeroy's Eq. Juris. 4th Ed. Vol. 2, s. 856.

5. The Supreme Court has spoken twice upon the right of equitable subrogation. It first defined the right; then it determined its operation. It expressly declared that an agreement for subrogation is not necessary.

In *Memphis R. R. Co. v. Dow*, 120 U. S. 287, the Court said—

“The right of subrogation is not founded on contract. It is a creature of equity; is enforced solely for the purpose of accomplishing the ends of substantial justice; and it is independent of any contractual relations”.

And in *Aetna Life Insurance Co. v. Middleport*, 120 U. S. 534, the Court also said—

“Subrogation as a matter of right, independent of agreement, takes place only for the benefit of

insurers, or one who, being himself a creditor, has satisfied the lien of a prior creditor; or for the benefit of a purchaser who has extinguished an encumbrance upon the estate which he has purchased”.

While it is not claimed that *Taylor v. Macgreal*, 167 U. S. 688, 701, is decisive of the present case, yet it illustrates the operation of the right of equitable subrogation for the purpose of accomplishing the ends of substantial justice.

6. The right of equitable subrogation is the means equity has adopted to prevent unjust enrichment. *It is founded upon the generally accepted maxim that no one shall be enriched at another's expense.*

In re Farmers' & Mechanics' State Bank, 175 Wash. 78, 85.

Hall v. Windsor Savings Bank, 97 Vt. 125, 133.

Moritz v. Redd, 151 Va. 644, 652.

Clifford v. West Hartford Creamery Co., 103 Vt. 229, 238.

Walker v. Walker, 138 Tenn. 679, 682.

Mahnk v. Blanchard, 233 App. Div. (N. Y.) 555.

Rachel v. Smith, 101 Fed. 159.

Stowers v. Wheat, 78 Fed. (2d) 25.

In applying the doctrine of equitable subrogation, the Courts seek out the substance and broad equities of the parties and do not allow form and technicalities to thwart its operation or pervert the spirit that gave it birth.

Enders v. Brune, 4 Randolph (Va.) 438, 447.

Merchants' & Miners' Trans. Co. v. Robinson-Baxter Co., 191 Fed. 769, 772.

Barnes v. Cady, 232 Fed. 318, 324-328.

7. While the Circuit Court of Appeals in *Merchants' and Miners' Trans. Co. v. Robinson-Baxter Co.*, ante, laid down the following rule for the guidance of Courts—

“In applying the equitable doctrine of subrogation, no attention should be paid to technicalities which are not of insuperable character, but the broad equities should always be sought out so far as possible”,

nevertheless appellees will likely urge technicalities in defense of the appealed decree but there are no “broad equities” to which they can cling.

The appellees did not acquire their lien after the second mortgage was paid and released and they extended no credit upon the strength of the release. They took their third mortgage while the second mortgage was in full legal existence, recorded and unsatisfied, and with notice that it was a valid prior lien, yet appellees now seek *and have obtained* unjust enrichment by taking advantage offered by an inadvertence or mistake of appellant in not having her title examined. This, equity will not allow. *Shaffer v. McClosky*, 101 Cal. 576.

Appellant paid the second mortgage after she contracted to purchase and before she obtained her deed to the property (as was the case in *Barnes v. Cady*, 232 Fed. 318), and to allow her subrogation under the second mortgage would preserve to her the benefit of her payment, leave the third mortgage in its original condition or rank, inflict no injury upon the appellees, prevent injury and loss to appellant and invoke exact justice to all.

The admitted facts alleged in the bill present a typical case for the operation of the doctrine of equitable subrogation to the rights of the mortgagee under the second mortgage and one need not look beyond Pomeroy's Eq. Juris. 4th Ed. ss. 1211 and 1212 for the controlling law of the case. However, the following Federal and State decisions are decisive of appellant's right to subrogation under the second mortgage.

FEDERAL COURTS.

Barnes v. Cady, 232 Fed. 318, 324.

Stowers v. Wheat, 78 Fed. (2d) 25.

Rachel v. Smith, 101 Fed. 159, 164-167.

STATE COURTS.

Arkansas

Southern Cotton Oil Co. v. Napoleon Co., 108 Ark. 555.

California

Darrough v. Herbert Kraft Co. Bank, 125 Cal. 272.

Matzen v. Shaeffer, 65 Cal. 81.

Colorado

Capitol Nat'l. Bank v. Holmes, 43 Colo. 154.

Georgia

Dissenting opinion at p. 188 in re *Bank of Canton*, 183 Ga. 185.

Illinois

Young v. Morgan, 89 Ill. 199.

Indiana

First Nat'l Bank v. Moore, 89 Ind. App. 189.

Kansas

Breyfogle v. Jackson, 113 Kan. 373.

Maine

Stevens v. King, 84 Me. 291.*Williams v. Libby*, 118 Me. 80.

Mississippi

Prestridge v. Lazan, 132 Miss. 168.

New Hampshire

Fifield v. Mayer, 79 N. H. 82.

New Jersey

Elmora & West End &c. Assn. v. Dancy, 108 N. J. Eq. 542.

New York

Pittsburgh-Westmoreland Coal Co. v. Kerr, 220 N. Y. 137.*Barnes v. Mott*, 64 N. Y. 397.*Arnold v. Green*, 116 N. Y. 566.*The Thrift v. Michaelis*, 259 N. Y. 302.*Everson v. McMullen*, 113 N. Y. 293, 299-300.

North Carolina

Wallace v. Benner, 200 N. C. 124.

Ohio

Joyce v. Dauntz, 55 Ohio St. 538.

Tennessee

Dixon v. Morgan, 154 Tenn. 389, 396-411.

Utah

Johnson v. Tootle, 14 Utah 483.

Vermont

Hill v. Ritchie, 90 Vt. 318, 322.

Virginia

Hudson v. Dismukes, 77 Va. 242.

A few State Courts have not followed Pomeroy Eq. Juris., but their decisions lack conviction [REDACTED]
[REDACTED]

Upon the facts and the decisions, *ante*, appellant looks forward confidently to this Honorable Court acclaiming that equitable subrogation is a living sentinel who guards the unwary and protects against unjust enrichment by others.

Respectfully submitted,

GEORGE C. GERTMAN,
Attorney for Appellant.

UNITED STATES

~~COURT OF APPEALS~~ FOR THE
DISTRICT OF COLUMBIA

FILED AUG 6 - 1936

IN THE

United States Court of Appeals
for the District of Columbia

Monroe Burk
CLERK

APRIL TERM, 1936

No. 6748

MINNIE M. BURGOON, APPELLANT,

vs.

ROSA LAVEZZO, JOSEPH T. SHERIER, TRUS-
TEE, WILLIAM H. McDONALD, TRUSTEE.

JOSEPH T. SHERIER,
Attorney for Appellees.

**United States Court of Appeals
for the District of Columbia**

APRIL TERM, 1936

No. 6748

MINNIE M. BURGOON, APPELLANT,

vs.

**ROSA LAVEZZO, JOSEPH T. SHERIER, TRUS-
TEE, WILLIAM H. McDONALD, TRUSTEE.**

BRIEF OF APPELLEES

STATEMENT OF FACTS

The statement in appellant's brief does not, it is believed, sufficiently present the facts entering into the transaction under investigation.

On November 7, 1931, the date of the recordation of the conveyance from Dorsey to Burgoon, there were of record against the property two encumbrances—the first trust held by the Perpetual Building Association and the so-called third trust owned by appellee Lavezzo, and recorded April 30, 1931 (R. p. 4). Prior to the conveyance by Dorsey to Burgoon, on November 2, 1931, Green and wife, on July 30, 1931, conveyed back to Dorsey, with special warranty, their equity in the property. While it does

not appear affirmatively that this conveyance was accepted by Dorsey in satisfaction of the indebtedness of the Greens to her, yet such acceptance should be implied from the fact that Dorsey thereafter treated the property as her own, procured the release of that trust and later conveyed the property to Burgoon by warranty deed, subject only to the trust securing the building association.

The bill shows that the notes secured by Dorsey's trust were *payable to her*, and at all times *held and owned by her*. She was under no personal obligation to anyone with respect to the property, and, after the release of her trust, stood in the position of owner, subject only to the incumbrance of the first and Lavezzo trusts.

No agreement is alleged between Dorsey and Burgoon by which the latter undertook to pay, as part of the purchase price, the Green notes, *owned by Dorsey* and secured by her trust which had been released on October 31, 1931, *before the conveyance to Burgoon* (R. p. 4). Nor is it alleged that there was any understanding that the cash payment made by Burgoon should be used by Dorsey to discharge the Green's indebtedness to her theretofore secured by Dorsey's trust. There was no agreement between Dorsey and Burgoon that the latter should have a lien on the property to the extent of the cash payment, or that the alleged debt secured by Dorsey's trust should be assigned to Burgoon or kept alive by Dorsey for the benefit of Burgoon. Neither the notes nor the trust were assigned or delivered to Burgoon. The release of the trust recited the payment and cancellation of the notes. There is nothing to show that these notes were not surrendered to the Greens upon the release of the trust.

It is not charged that Burgoon was connected, as surety or otherwise, with the obligation of the Greens

to Dorsey, or that, in purchasing the property and making the down payment, she did so at the request of the Greens or to protect any interest she then had in the property. Her only connection with the transaction appears to have been entirely voluntary, and for the purpose of making a profit. There is nothing to indicate that the Greens were consulted by Burgoon regarding the discharge of their obligation to Dorsey, in respect of which the appellant now claims the right of subrogation. Burgoon had no knowledge of the alleged debt of the Greens to Dorsey. The cash payment to Dorsey by appellant was not used to pay the debt of the Greens to Dorsey, because that debt had been released; nor was it used to pay any debt that Dorsey owed to any third person affecting the property involved. The bill does not show the date of the cash payment by Burgoon, nor does it state the date on which it is alleged it was applied to the payment of the Dorsey trust. For aught that appears in the record, the Dorsey trust was released before the cash payment was made by Burgoon. There was no discharged debt to the security of which Burgoon could have been subrogated by reason of her payment.

ARGUMENT

Appellant Is Not Entitled To Subrogation

On the facts disclosed by the bill, the appellant has no claim to be subrogated to the rights of Dorsey under the latter's trust. Subrogation, as a matter of right, is permitted only where the party claiming it has paid the debt of a third person as surety, under some necessity, or in order to protect an existing interest of the payor in the property affected. It is not asserted by appellant that she is entitled to subrogation under any contract between her and the parties involved. Therefore, she must show that the payment

by her, by reason of which she alleges the right arose, was not voluntarily made. This rule has been recognized and approved by the Supreme Court.

In *Aetna Life Insurance Co. v. Town of Middleport*, 124 U.S. 534, 31 L. ed. 537, the town voted appropriation of money to aid in the construction of a railroad. The railroad accepted and built a road through the town. Upon failure to raise the appropriation by taxation, the town issued bonds to the railroad, which believed them to be valid. The bonds were purchased by the insurance company in good faith. Later, in a state court, the issuance of the bonds was held invalid, and the insurance company enjoined from their collection. The insurance company sought subrogation to the right of the railroad company to enforce the valid appropriation, the railroad being insolvent. In denying the relief, the Supreme Court quoted with approval from *Gadsden v. Brown*, Speer's Eq. (S.C.) 37, 41, where *Chancellor Johnson* said:

“The doctrine of subrogation is a pure unmixed equity, having its foundation in the principles of natural justice, and from its very nature could never have been intended for the relief of those who were in any condition in which they were at liberty to elect whether they would or would not be bound; and, so far as I have been able to learn its history, it has never been so applied. * * * It has been directed in its application exclusively to the relief of those that were already bound who could not but choose to abide the penalty.”

Further, on page 547, the court stated:

“One of the principles lying at the foundation of subrogation in equity, in addition to the one already stated, that the person seeking this subrogation must have paid the debt, is that he must have done this under some necessity, to save himself from loss which might arise or accrue to him

by the enforcement of the debt *in the hands of the original creditor*; that, being forced under such circumstances to pay off the debt of a creditor who had some superior lien or right to his own, he could, for that reason, be subrogated to such rights as the creditor, whose debt he had paid, had against the original debtor. As we have already said, the plaintiff in this case paid no debt. It bought certain bonds of the railroad company at such discount as was agreed upon between the parties, and took them for the money agreed to be paid therefor.

“But even if the case here could be supposed to come within the rule which requires the *payment* of a debt in order that a party may be subrogated to the rights of the person to whom the debt was paid, the payment in this case was a voluntary interference of the Aetna Company in the transaction. *It had no claim against the Town of Middleport. It had no interest at hazard which required it to pay this debt.* If it had stood off and let the railroad company and the Town work out their own relations to each other it could have suffered no harm and no loss. There was no obligation on account of which, or reason why, the complainant should have connected itself in any way with this transaction, or have paid this money, except the ordinary desire to make a profit in the purchase of bonds.”

The court quoted Sec. 240 of Sheldon, Subrogation, as follows:

“The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, without being under any legal obligation to make the payment, and without being compelled to do so for the preservation of any rights or property of his own.”

In *Sanford v. McLean*, 3 Paige 122, quoted with approval in the Aetna case, *supra*, it was said:

“It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor, as a matter of course, without any agreement to that effect. In other cases the demand of a creditor, which is paid with the money of a third person, and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished.”

Likewise, in *Shinn v. Budd*, 14 N. J. Eq. 234, cited and approved in *Aetna v. Middleport*, above, the rule was announced as follows:

“Subrogation as a matter of right, as it exists in the civil law, from which the term has been borrowed and adopted in our own, is never applied in aid of a mere volunteer. Legal substitution into the rights of a creditor, for the benefit of a third person, takes place only for his benefit who, being himself a creditor, satisfies the lien of a prior creditor, or for the benefit of a purchaser who extinguishes the incumbrances upon his estate, or of a co-obligor or surety who discharges the debt, or of an heir who pays the debts of the succession.”

In *Suppiger v. Garrels*, 20 Bradw. (Ill.) 625, approvingly cited in the *Aetna* case, it was stated:

“Subrogation in equity is confined to the relation of principal and surety and guarantors, to cases where a person to protect his own junior lien is compelled to remove one which is superior, and to cases of insurance. * * * Anyone who is under no legal obligation or liability to pay the debt is a stranger, and, if he pays the debt, a mere volunteer.”

The later case of *Prairie State National Bank v. United States*, 164 U.S. 227, was decided on authority

of *Aetna Life Insurance Co. v. Middleport*, *supra*, and other cases there cited.

In a note to *American Bonding Co. of Baltimore v. National Mechanics Bank of Baltimore*, (97 Md. 598) reported in 99 Am. St. Rep. 466, 493, the legal status of a person voluntarily paying the debt of another is described as follows:

“Volunteers do not stand high in the favor of equity. And the rule is as old as the law of subrogation that one who pays the debt of another of his own motion, without any request to do so, without having any interest in the matter, without any right to protect or property to save, and without any compulsion, is regarded as a mere volunteer or intermeddler; and he thereby acquires no right to subrogation, in the absence of any contract, assignment, or expectation that he will be substituted in the place of the creditor.”

In *Roberts v. Best*, 172 Mo. 67, 81, administrators, believing the personal property and the proceeds of the sale of real estate would be sufficient to pay the debts of deceased, discharged out of their own funds certain debts of the estate. Thereafter they brought suit, seeking to be subrogated to the rights of the creditors whose claims they had paid, and obtained a decree in their favor. An heir who was not a party to the subrogation cause brought ejectment against a purchaser from the administrators. In denying the purchaser subrogation to the rights of the administrators, the court said:

“Before he [purchaser] can be subrogated to the rights of the party holding such incumbrance, lien or charge, the purchaser must be able to show that his or her payment was made, as either the result of compulsion, or for the protection of some interest he or she had in the property that was threatened or imperiled by the incum-

brance, lien or charge. * * * The payment must have been made by one who *at the time had*, or in good faith supposed he had, an interest in discharging the demand. Mere volunteers or strangers have no such right. * * * She [the purchaser] had no interest to protect, no rights that were threatened or in anywise impaired by the lien or charge upon the land to be sold."

In *Fidelity & Deposit Co. v. Vance*, 135 Okla. 24, the rule is stated in the syllabus as follows:

"When the vendee, in payment of the purchase price of real estate, pays indebtedness secured by a first mortgage he is not subrogated to the lien of that mortgage as against a second mortgagee whose mortgage is duly recorded at the time of the purchase.

"The vendee who assumes an incumbrance on real estate and pays the same as a part of the purchase price, being under no duty to buy the land, is a volunteer and is not entitled to subrogation to the extent of such payment against a junior mortgagee of whose lien such vendee has constructive, though not actual, notice at the time of payment.

"Misrepresentation of the vendor to the vendee of the nonexistence of such junior mortgage, where the junior mortgagee does not participate in such fraud, does not remove the bar to such vendee's right to subrogation, although such vendee had no actual notice of the existence of such junior lien."

In *Kahn v. McConnell*, 131 Pac. 682, 47 L. R. A. (N. S.) 1189, the Supreme Court of Oklahoma held that the doctrine of equitable subrogation did not apply in favor of a vendee who pays off the lien of a first mortgage, in ignorance of the existence of a junior mortgage. There land was owned by A. A. and A. M. McConnell, subject to a first mortgage and also a second mortgage to secure a debt to the plain-

tiff, Kahn. The defendant Wright purchased the first mortgage notes and, pursuant to an agreement with the McConnells, surrendered the notes to them in return for a deed to the property. Wright had no actual knowledge of the recorded second mortgage. A decree of the lower court, dismissing the plaintiff's bill for foreclosure was reversed, the appellate court saying (p. 1191, 47 L. R. A. (N. S.)):

“But under the facts of this case, Wright, the purchaser from McConnell, was not subrogated to the lien of the bank. The plaintiff's mortgage was of record. Wright had constructive notice of it, although it may not have been actual. It could have been ascertained by the exercise of reasonable diligence on his part in the examination of the records. He therefore bought the land charged with notice of the plaintiff's mortgage. The fact that he assumed the indebtedness to the bank and paid it did not give him the right of subrogation. In the matter of that payment he was a volunteer. *He was under no duty to buy the land. He was under no duty to pay the first mortgage.* He was negligent in doing so without examining the records, and cannot escape the consequence of his own negligence by an appeal to the equitable doctrine of subrogation.”

Wright's position in the case last cited was much stronger than that of appellant, in that Wright actually bought the first mortgage notes from the holder thereof, while here it is not contended that appellant even knew of the existence of the Green mortgage.

In *Avon-by-the-Sea Land & Improv. Co. v. McDowell*, 71 N. J. Eq. 116, 62 Atl. 865, a case in which a purchaser of property, subject to several encumbrances, paid off a prior mortgage, the court, in holding that equity would not revive the prior encumbrance as against subsequent ones by application of the doctrine of subrogation, said:

“The law is settled that where the owner or purchaser of property subject to several encumbrances pays off a prior encumbrance by his own money, the payment enures to the benefit of the subsequent encumbrances, and as against them the prior encumbrances cannot be kept alive for the owner’s benefit, even by express agreement.

* * * A fortiori on such payment by the owner, without any agreement for subrogation or keeping the security alive, a court of equity will not revive the prior encumbrance against subsequent encumbrances by the application of the equitable doctrine of subrogation in favor of the owner.”

In *Stastny v. Pease*, 124 Ia. 587, one Sargent, on April 6, 1895, mortgaged his property to a building association. On January 11, 1897, he made a second mortgage of the property to the building association. On January 26, 1897, the defendant secured a judgment against Sargent and wife, which was a junior lien to the above mortgages. In 1898, the building association foreclosed, making the Sargents alone parties. The property was purchased at the foreclosure by the building association on November 9, 1898, and *the mortgages marked satisfied*. On September 20, 1899, Sargent and wife sold and conveyed the property to the plaintiff, who procured an abstract of title, which did not disclose the existence of the defendant’s judgment. The property was thereafter redeemed by Sargent with money furnished by the plaintiff, who also paid the arrears of taxes. On May 9, 1902, the property was sold on execution issued on the judgment of the defendant and bought in by the latter who entered his judgment satisfied. The lower court subrogated the plaintiff to the rights of the mortgages of the building association.

On appeal the judgment was reversed, the appellate court holding that there was no equitable assignment of the rights of the mortgagee, no purchase by the

plaintiff of the liens against the land, and no right to subrogation.

In *Conner v. Welch*, 51 Wis. 431, a mortgagor conveyed the mortgaged property to the mortgagee under an agreement by which the latter undertook to pay the mortgage liens on the land other than that of the mortgagee and release the mortgagor of his obligation. The mortgagee paid the mortgage liens, but not a judgment held by the defendant, Welch, of which he had no actual notice.

It was held that the mortgagee was not, under the circumstances, entitled to be subrogated to the lien of the discharged mortgages as against the judgment of the defendant.

Under somewhat similar facts, the same conclusion was reached in the following cases:

Garwood v. Eldridge, 2 N. J. Eq. 145;
 Goodyear v. Goodyear, 72 Ia. 329;
 Wade v. Beldmeir, 40 Mo. 486;
 Tarboro v. Micks, 118 N.C. 162;
 Hayden v. Huff, 60 Neb. 625;
 United States v. Taylor, 268 Fed. 635.

In *Weidner v. Thompson*, 69 Ia. 36, a case strikingly similar to this, it appeared that a mortgage was given to secure a loan of \$2,000. Thereafter, judgments were obtained against the mortgagor. Later the mortgagor deeded his equity in the property to the mortgagee, who subsequently conveyed to the father of the mortgagor who gave his note for the purchase price secured by mortgage on the property. The son's note was marked paid and delivered to the purchaser, and the mortgage securing the same cancelled of record.

The judgment creditors endeavored to subject the land to the payment of their judgments, and the purchaser sought to set aside the cancellation of the

mortgage and to foreclose the same. In denying that relief to the purchaser, the court said:

“The controlling point in the case involves the consideration of the question whether the mortgage was paid, and was intended to be cancelled, and was not intended to subsist as a lien for the benefit of plaintiff. It cannot be doubted that the law will look to the intention of the parties, and the interest of the plaintiff, in order to determine whether the mortgage is to be regarded as paid and cancelled. The fact that it was cancelled of record will not avail to discharge the mortgage, if the parties intended that the lien should continue, and plaintiff’s interests demanded it. But if the parties intended to discharge the mortgage, *and the debt was in fact paid, and not transferred to plaintiff*, the cancellation must stand, and the lien be regarded as discharged. The mere fact that plaintiff’s interest would have been better protected by permitting the lien to stand will not control against the intention, clearly established. The law will permit a party in such a case, as in others, to act and contract in a manner which would not result to his interest. There is no conflict of decisions upon these principles, and we think there is no dispute between counsel in relation thereto.

“In our opinion, the evidence clearly shows that the parties intended to cancel the mortgage and discharge the lien, *and there was no thought or wish on the part of the plaintiff to preserve it. Plaintiff does not stand in the position of a mortgagee acquiring the mortgaged land. He did not purchase the mortgage debt; the mortgage and note secured by it were not transferred to him, but were cancelled.* He paid the debt, and for his advance received the conveyance of the real estate. Either as a volunteer, or, it may be, upon the request of the mortgagor, the payment was made. The case is different from that of a mortgagee taking a conveyance of the mortgaged land

from the mortgagor, wherein it is held that the mortgage will not merge in the acquired title. The cases cited by plaintiff's counsel are of this character. We conclude that, the mortgage debt having been paid, the plaintiff cannot set up the cancelled mortgage to defeat defendants' judgment."

It is to be presumed that appellants' bill states her case in its most favorable aspect. If any agreement existed between the Greens and Dorsey to the effect that the former's debt to the latter was not to be discharged by the conveyance of the equity to Dorsey, it is not likely such a material fact would have been omitted from the bill. The absence of an averment to that effect justifies the conclusion that no such understanding existed, but that on the contrary the conveyance was received as a discharge of the debt.

Applying the principles above laid down, it is believed appellant has not brought herself within either of the rules which might entitle her to subrogation to the rights of Dorsey under the latter's trust. She was under no obligation whatever to pay and did not discharge the indebtedness of the Greens to Dorsey; she was without knowledge as to the existence of that alleged indebtedness; she was not requested by the Greens or Dorsey to make such payment, and had no agreement of any description in respect of that trust; at the date of the purchase, she had no interest in the property which required protection, and was entirely free to elect whether she would or not make the purchase. There was no agreement between appellant and Dorsey that the down payment would be applied towards the discharge of the Green indebtedness, nor was there any understanding that appellant was to have any lien upon the property for the cash payment, nor that the debt secured by Dorsey's trust would be assigned to appellant or kept alive for her

benefit. Neither the notes nor the trust were ever transferred to appellant, and, so far as the record shows, may have been surrendered to the Greens upon the release of the trust. Apparently, her sole purpose in the purchase was to make a profit. These facts, it is believed, clearly bring the case within the doctrine announced in the foregoing authorities and disentitle the appellant to the relief sought.

As said in *Weidner v. Thompson*, *supra*, the position of the appellant is different from that of a mortgagee acquiring the mortgaged property. She did not purchase the mortgage debt; the mortgage and the notes secured were not transferred to her, *but were cancelled*. Appellant is in no position to claim that the conveyance of the Greens to Dorsey did not operate as a merger and discharge of the indebtedness. If appellant is entitled to assert such a claim, then those hereafter acquiring title through her, without regard to their remoteness from the merger transfer, may be given the same right.

The inescapable inference from the bill is that, as between Dorsey and the Greens, the debt of the latter was regarded as discharged by the conveyance to Dorsey of the equity of redemption. Dorsey went into possession and thereafter treated the property as her own; without authority from the Greens, sold and conveyed it to appellant at a price satisfactory to the contracting parties, and caused the Green indebtedness to be entered satisfied and released of record.

Somewhat similar acts in *MacFarlane v. Wardman Real Estate Investment Corporation*, 64 App. D. C. 76, were held to amount to a discharge of a secured indebtedness.

Appellant has cited more than fifty cases, the facts in none of which are stated. An examination of those cases has disclosed that in most, if not all of them,

the party claiming subrogation did not occupy a position like the appellant here, but, because of his interest in the property, or obligation to pay the debt of a third party, was entitled to relief under the above well established rules.

Both parties to this transaction were equally innocent and diligent, in that it was represented to each that the first trust was the only incumbrance against the property, and neither had the title examined. Neither had actual notice of the other liens. As the result of the release of the Dorsey trust, the trustees for the appellee Lavezzo hold the legal title for her benefit, subject only to the lien of the first trust. In such circumstances, the equitable maxim that "where the equities are equal the law will prevail," is applicable.

It is respectfully submitted that the judgment of the court below was right, and should be affirmed.

JOSEPH T. SHERIER,
Attorney for Appellees.